No. 89-640

In the Supreme Court of the United States

OCTOBER TERM, 1989

MANUEL LUJAN, JR.,
SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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This case concerns fundamental principles of this Court's standing jurisprudence—implicated by the specific question whether a federal court may effectively supplement a plaintiff's standing allegations by "presuming" facts that the plaintiff has not, and perhaps cannot, allege on its own. The court of appeals held that respondent had sufficiently demonstrated its standing in this case when it submitted the single affidavit of one of its members, Peggy Kay Peterson. Ms. Peterson averred that her recreational use of federal lands—and, in particular, those lands "in the vicinity of the South Pass-Green Mountain area of Wyoming"—had been affected by unlawful actions taken by petitioners. Although the court of appeals acknowledged that only 4,500 acres of that 2,000,000-acre federally

managed area had been affected by petitioners' land use decisions, and that Ms. Peterson had not alleged any use of those particular 4,500 acres, the court held that the affidavit could be read "to *presume* that the 4500 newly opened acres included the areas that Peterson uses" (Pet. App. 16a-17a). Without such a "presumption," the court added, Peterson's use and enjoyment "would not be 'adversely affected.' * * * If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious" (*id.* at 17a). Refusing to entertain either possibility, the court of appeals determined that Peterson's language must be "read to refer to the lands affected by the Program * * *" (*ibid.*) And, by "presuming" the necessary facts, the court conferred standing on respondent to challenge not only those orders pertaining to the 4,500 affected acres in South Pass-Green Mountain, but also those relating to the entire 180,000,000 acres of federal land at stake in the litigation.

We restate the court of appeals' decision because respondent evidently has no desire to defend it on its own terms. Respondent ignores the court's actual holding; it recharacterizes the decision in terms not articulated by the court itself; and, finally, it supports the court of appeals' judgment on the basis of supplemental affidavits correctly excluded by the trial court. In the end, respondent offers no basis for sustaining the decision below, or the highly intrusive role that decision adopts for the federal courts in overseeing the management authority of the Secretary.[1]

[1] Respondent suggests (Br. in Opp. 2-3), in passing, that the withdrawal revocations effected during the early 1980s resulted from a political shift regarding the extent to which public lands should be opened to mining claims. That suggestion is mistaken. Withdrawal review generally began in the 1950's (Affidavit of Vincent J. Hecker, ¶ 3, attached as an exhibit to Defendant's Motion for Summary Judgment and/or Dissolution of the Preliminary Injunction). And in 1976, it was Congress that specifically commanded the Secretary to review all withdrawals of BLM lands in 11 key states—withdrawals that had closed those lands to mining claimants or mineral leasing. Section 204(*l*) of FLPMA, 43 U.S.C. 1714(*l*).

1. Respondent makes no effort to defend the reasoning of the court of appeals.[3] Indeed, respondent's truncated account of the decision (Br. in Opp. 12-13) completely elides the crucial language used by the court of appeals in reversing the district court. As respondent would have it, "[t]he court of appeals did not, as the Secretary suggests, 'presume' that a 'mere claim of standing necessarily implies a factual basis to support it.' Gov. Br. at 21" (*id.* at 17). But respondent is unable to explain the court of appeals' central thesis: that "Peterson's affidavit can be read to *presume* that the 4500 newly opened areas included the areas that Peterson uses; otherwise *her* use and enjoyment would not be adversely affected in any way" (Pet. App. 17a).

[2] Respondent does, however, offer two alternative bases—not reached by the court of appeals—to support standing in this case. It first suggests (Br. in Opp. 5-6, 12, 22 & n.15) that standing might be predicated upon Representative Bruce Vento's challenge, stated in Count II of the complaint. But the trial court dismissed that claim and, following the decision by the court of appeals, Representative Vento voluntarily dismissed his appeal. Moreover, even if the Congressman wished to pursue his claim, respondent could not predicate its own standing on that basis. See *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) (a party generally "cannot rest [its] claim for relief on the legal rights or interests of third parties").

Second, respondent contends (Br. in Opp. 18 n.11) that it may rest its standing to sue on an "informational standing" theory. The district court (Pet. App. 31a-32a) rejected that claim, however, finding the supporting affidavit to be "conclusory and completely devoid of specific facts" (*id.* at 32a). The court of appeals did not reach that point, preferring instead to sustain respondent's standing on other grounds.

In respondent's view (Br. in Opp. 18), all the court below did was "review[ ] the evidence contained in Ms. Peterson's affidavit, as well as other evidence in the record, and drew the only logical inference available to it, *i.e.*, that Ms. Peterson, in fact, is injured by the Department's actions." But the court of appeals' opinion rested on no such "evidence in the record" (see Pet. App. 17a). The court focused simply on the affidavit itself, presumed enough to give respondent standing, and then moved on.[3]

2. Respondent contends (Br. in Opp. 17) that this Court's decision in *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), supports its allegation of standing in this case. For two reasons, the *SCRAP* case does not extend that far. First, unlike the plaintiffs in *SCRAP*, respondent did not advance "allegations which, if proved, would place [respondent] squarely among those persons injured in fact by the [government's] action * * *" (*SCRAP*, 412 U.S. at 690). Even if true, Ms. Peterson's central allegation—that she "use[s] federal lands, including those in the vicinity of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment" (Pet. App. 190a)—does not by its terms assert any "injury in fact by the [government's] action" in this case. To the contrary, Ms. Peterson could easily use and enjoy the vast expanse of the 2 million-acre South Pass-Green Mountain area without ever happening upon, or being in any way

[3] Respondent's alternative suggestion (Br. in Opp. 19)—that this case involves simply the court's "alleged misreading of Ms. Peterson's affidavit"—is also incorrect. The court of appeals read the affidavit correctly, but then, quite explicitly, supplemented it. The court did respondent's work for it, presuming allegations that are simply not in the affidavit. A court of appeals may not find facts that the parties have not adduced on their own. Cf. *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986).

affected by, activities on the 0.225% of the land that was subject to the only challenged land actions in this region.[4]

Second, respondent fails to acknowledge *SCRAP*'s additional teaching that, while the simple allegation of specific and perceptible harm may be sufficient to withstand a motion to dismiss for lack of standing, on a motion for summary judgment the plaintiff must show that its allegations are "true and capable of proof at trial" (*SCRAP*, 412 U.S. at 689). The assertion of injury in the Peterson affidavit was clearly not sufficient at summary judgment, when respondent bore an affirmative burden to establish this essential element of its case. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). Respondent's claim, at bottom, is that Ms. Peterson used some land in the vicinity of a huge area, a small fraction of which has been affected by challenged activities. And, with that modest toehold, respondent has sought—and been awarded—standing to challenge hundreds of independent land use decisions, covering tens of millions of acres of land. As generous as it

[4] Respondent misstates (Br. in Opp. 16 n.9) our point about the size of South Pass-Green Mountain. We did *not* contend that the area in the vicinity of South Pass-Green Mountain *in which Ms. Peterson recreates* is 2,000,000 acres; given the vagueness of her affidavit, we have no idea how much land she personally uses. Rather, our point was that the federal landholding at Green Mountain-South Pass comprises about 2 million acres, a point underscored by the trial court as well (see Pet. App. 35a; see also Affidavit of Jack Kelly, Manager of the Lander, Wyoming Resource Area for the Bureau of Land Management, ¶ 24, attached as an exhibit to Defendants' Motion for Summary Judgment and/or Dissolution of the Preliminary Injunction). The Draft Lander Resource Management Plan/EIS cited by respondent was prepared in 1986 (after the events at issue in this litigation), and discussed two small subunits of the 2,077,702-acre area generally known as Green Mountain-South Pass, and originally covered under Classification W-6228.

is, *SCRAP* does not support so extravagant an assertion of standing.

3. Apparently recognizing that the Peterson affidavit is insufficient, respondent devotes much of its response (Br. in Opp. 9-12, 19-22) to an attempt to resuscitate the supplemental affidavits it submitted after the close of the hearing on summary judgment.[5] In respondent's view, "the Secretary asks the Court to place an embargo on any supplementation of the factual record on standing" (*id.* at 20-21). We ask for no such "embargo." Instead, the second question presented is whether the trial court abused its discretion when, consistent with Federal Rule of Civil Procedure 56(c), it refused to consider the untimely affidavits. Plainly, it did not. Even respondent concedes (Br. in Opp. 21 n.14) that Rule 56(c)—albeit under a "narrow reading" of its language—supports the trial court's refusal to accept the new factual materials after the close of the summary judgment hearing.[6]

In no sense was the district court's refusal to accept the additional filings "unfair."[7] At least from the time petitioners filed their summary judgment motion, respondent had known that standing was a central issue. Respondent thereafter had two full years to supply satisfactory affidavits. It failed to do so. And it was respondent that prevented petitioners from exploring the factual basis for respondent's standing—by successfully seeking a protective order on the ground that further development of the facts "would be unreasonably cumulative, duplicative, burdensome, and expensive." Motion to Quash and for a Protective Order 7; Pet. App. 170a. By taking that position, it was respondent, not petitioners, that "place[d] an embargo on any supplementation of the factual record on standing * * *" (Br. in Opp. 20-21).

Respondent's failure to substantiate its claim of standing in this case cannot be excused on "efficiency" grounds—that it would be "wasteful" to make respondent refile its case (Br. in Opp. 21). If, as we contend, respondent's factual submissions were inadequate, then the courts below had no jurisdiction to entertain the lawsuit; concerns about judicial efficiency cannot overcome the absence of jurisdiction. Nor does the ease with which respondent claims (*ibid.*) it can cure the Peterson affidavit excuse the insufficiency of that filing. A similar claim could no doubt be made in many a standing case, but such a claim is no basis for ignoring the governing principles limiting the jurisdiction of the courts. Cf. *Sierra Club* v. *Morton*, 405 U.S. 727, 735-736 n.8 (1972).[8]

[5] Respondent also quotes (Br. in Opp. 20) the court of appeals' statement (Pet. App. 21a) that "[n]o party" disputes the sufficiency of the new affidavits. That is incorrect. We have never conceded the sufficiency of the supplemental affidavits, and we reserve the right to challenge both the sufficiency and bona fides of those filings should the issue be pertinent in any further proceedings.

[6] The only "new evidence" (Br. in Opp. 21 n.14) offered by petitioners at oral argument concerned an update of the number of completed Resource Management Plans. Tr. 55-56, 92. Respondent made no objection to that innocuous submission, and it never requested an opportunity to respond. *Ibid.*

[7] Nor was respondent's submission of factual material "in compliance" (Br. in Opp. 10) with the court's request to the parties for "supplemental memoranda, not exceeding 20 pages, directed to the issue of standing." See Tr. 91-92. The district court did not ask for additional *factual* material, and respondent did not seek leave to submit such items.

[8] Respondent contends (Br. in Opp. 21) that "[t]his Court repeatedly has remanded cases to permit supplementation of the factual allegations in support of standing," but the cases respondent cites do not support that broad assertion. Although respondent cites an opinion concurring in the judgment in *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 55 n.6 (1976), the Court in that case remanded with instructions to *dismiss* the complaint for lack of standing, without affording the plaintiffs an additional opportunity for fac-

4. Finally, respondent's discussion (Br. in Opp. 23-25) of the "separation of powers clause" (*id.* at 23, 24) misses the point. Simply because respondent has alleged violations of "statutory obligations" (*id.* at 25) does not give the courts authority to act in the absence of the complainant's standing. Nor does it vitiate the highly intrusive nature of this litigation—an unprecedented instrusion on executive managerial authority that even the first panel of the court of appeals recognized as remarkable in its memorandum on rehearing (Pet. App. 117a-118a).[9]

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tual development. See 426 U.S. at 46. Similarly, the decision in *Warth* v. *Seldin*, 422 U.S. 490 (1975), affirmed the dismissal of the complaint by the district court for lack of standing, again without giving the plaintiffs an additional opportunity to develop factual support. See 422 U.S. at 518. *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), did not involve a remand either; the only issue before the Court was whether to sustain the grant of a preliminary injunction. In *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 377-378 (1982), the Court did remand for further factual development on standing. In the *Havens* case, however, the Court noted that the lower court's dismissal had been on the pleadings alone, and it directed a remand for the purpose of affording plaintiffs an opportunity to make more definite the allegations of the complaint. Here, by contrast, it was not the pleadings alone, but also the evidence in support of the pleadings, that was deficient. Moreover, respondent had repeated opportunities over several years to remedy the defects. It chose not to do so, either because it could not or perhaps because of a broader institutional interest in securing judicial sanction for its standing theories.

[9] As we emphasized in our petition (Pet. 17-18, 22-23), this case implicates fundamental principles of standing doctrine, and the holding below would improperly involve courts in the management of executive functions on an unprecedented scale. Thus, although there is not, as respondent notes (Br. in Opp. 13-14), a direct circuit conflict, this Court's review is warranted. Indeed, the absence of a circuit conflict is hardly surprising, since respondent's allegations are so far-reaching that a similar case could not readily arise in another circuit. If it did, however, it is hard to imagine that another circuit would indulge the same "presumption" about standing, or permit a claim about the use of land "in the vicinity" of affected property to confer standing to challenge land use decisions affecting about 180,000,000 acres of

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

DECEMBER 1989

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public land. Perhaps for that reason, respondent is unable to cite a single reported case supporting the decision below.

Respondent also contends that "in order to review this dispute, the Court will have to wade through the evidence presented by both sides and determine the factual content of [respondent's] affidavits and exhibits as well as those submitted by [petitioners]" (Br. in Opp. 19 n.13). That is not so. The court below found the Peterson affidavit entirely sufficient to confer standing. To decide the first question presented, this Court need only review the same affidavit; to decide the second question, the Court need only determine whether the trial court erred in refusing to permit respondent to supplement the Peterson affidavit at the final hour.

* The Solicitor General is disqualified in this case.

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